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In The

Supreme Court of the United States

October Term, 1973

No. A-236 | 73 236

NEW JERSEY CITIZENS FOR CLEAN AIR, INC., et al.,

Petitioners,

vs.

NEW JERSEY SPORTS AND EXPOSITION AUTHORITY,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

PETITIONERS' REPLY MEMORANDUM

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PETITIONERS' REPLY MEMORANDUM

This brief is submitted in reply to matters raised by Respondent, New Jersey Sports and Exposition Authority in its Brief in Opposition to Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Respondent's Statement of the Case is inaccurate or misleading in several respects.

1. At page three of Respondent's Brief in Opposition (hereinafter Resp. Br.) it is stated that "This case was previously before this Court on a prior appeal from the Supreme Court of New Jersey which was dismissed for want of a substantial federal question." The present case has never been before this Court. The case referred to was *New Jersey Sports and Exposition Authority v. McCrane*, 61 *N.J.* 1, 292 *A.2d* 545 (1972), appeal dismissed 409 *U.S.* 943 (1972). Petitioners herein did not participate in the application for certiorari in 61 *N.J.* as the grounds asserted did not concern the air pollution issue. The petitioners herein were *amicus curiae* in the earlier case solely to represent environmental interests, and had no part whatever to do with the appeal of that case to this Court. The present case is based on the New Jersey Supreme Court decision repeated in 62 *N.J.* and concerns review of the environmental hearings ordered in 61 *N.J.*

2. It is stated at Resp. Br. 4, 5 that the hearing below "was held solely pursuant to Section 23 of the New Jersey Sports and Exposition Authority Law", which relates to the environmental balance of the Meadowlands, and that the hearings were concerned solely with scientific and factual matters. This is somewhat misleading. The New Jersey Supreme Court did order the hearings because of Section 23; however, the hearings did cover the legality of the construction and location of the Sports Complex with reference to the Clean Air Act, 42 *U.S.C.* Section 1847 *et seq.* On reviewing these hearings, the Court noted that this had been proper.

> "A considerable part of the hearing was concerned with projections of the impact of the complex on air quality from the broad point of view of the public health. While the statutory obligation

> imposed on the Authority to consult with the named agencies were concerned only with the 'delicate environmental balance' of the meadowlands, our remand was sufficiently comprehensive to include the broader issue and the hearing agencies rightly concerned themselves with it."

In re Sports Complex in Hackensack Meadowlands, 62 *N.J.* 248, 300 *A.2d* 337, 340 (1973). It should be noted that the remand resulted from the Court's determination that prior informal hearings had not been sufficient, and it was ordered at the request of the petitioners herein, whose primary concern had been air pollution. The respondent's position, that the Clean Air Act was irrelevant to the proceedings below, infers that construction of the complex could have proceeded regardless of the findings concerning air pollution. Such a position seems untenable.

3. It is stated at Resp. Br. 6 that the hearing agencies findings contained measures to insure that federal ambient air quality standards would not be violated, citing the hearing agencies' findings at pages 260 to 262 of the petitioners' appendix (hereinafter Pet. App.). Close examination shows that these "measures" provide no insurance that federal air quality standards will not be exceeded; the only measure even referring to these standards is a requirement that "studies" be undertaken to provide "facilities and operational procedures . . . in order to prevent any possible exceeding of federal air quality standards . . ." The meaninglessness of this requirement is illustrated by the fact, never refuted by the respondent, that federal air quality standards are *already* being violated in the area where the sports complex is to be located. See page 6 of the Petition for Writ of Certiorari (hereinafter Pet.).

4. Finally, the respondent complains at Resp. Br. 8 and 9 that the petitioners herein submitted a Petition and a Repetition for Rehearing to the New Jersey Supreme Court after it rendered its opinion on February 5, 1973 which "raised new matters not previously considered" and that the Repetition for Rehearing does not exist under New Jersey appellate practice. Suffice it to say that the New Jersey Supreme Court, in denying the Repetition, noted that the matter had been "duly presented to the Court" Pet. App. 299a. Contrary to the respondents contention, petitioners consider this a recognition of the propriety of the Repetition by the final authority on New Jersey appellate practice. As to the substance of the petitions, the matters raised were new because they did not exist at the time of the Court's decision and could thus only be raised in petitions for rehearing. The Petition for Rehearing was submitted because the New Jersey Supreme Court had based its determination that the sports complex would not violate federal clean air standards on the assumption that a valid state implementation plan was in effect which would preclude this, 300 A.2d, at 340, 341, Pet. App. 271a, whereas, in fact, this implementation plan had been invalidated by the District of Columbia Court of Appeals on January 31, 1973, five days before the decision below. *Natural Resources Defense Council v. Environmental Protection Agency*, 475 F.2d 968 (D.C. Cir. 1973). Furthermore, the D.C. Circuit stated that the Administrator acted *illegally* in approving this implementation plan; apparently, there never had been a valid plan in effect. The Repetition for Rehearing was submitted on the basis of an announcement made by the Administrator at 38 Fed. Reg. 6279 (March 8, 1973) that supported the interpretation of the Clean Air Act argued by the petitions in the Court below, which petitioners considered as warranting a review of the decision.

REPLIES TO REASONS FOR DENYING THE PETITION

I

The thrust of the first reason, "Plaintiffs Rights under the Clean Air Act Remains Unimpaired by the Proceedings Below", is that sources of air pollution may only be brought under control after they have been built and have started violating air quality standards. It is the position of the petitioners herein and of the plaintiffs in *Marianne Wuillamey et al v. David A. Werblin, et al*, cited at Resp. Br. 10, that such is not the substance of the Clean Air Act and the various regulations promulgated thereunder.

The plaintiffs in *Wuillamey* argued that the respondent herein was required to obtain a permit to commence construction of its 25,000 car parking facility pursuant to a transportation control plan proposed by the Administrator of the Environmental Protection Agency on June 22, 1973, published at 38 Fed. Reg. 17782 (July 3, 1973). The complaint was dismissed largely because there was no present exceeding of federal air quality standards by the inchoate complex itself and the above cited regulation had only been proposed, and there could thus be no current violation of it. This transportation control plan requires some explanation.

The proposed transportation control plan was issued pursuant to the order of the Court in *Natural Resources Defense Council v. Environmental Protection Agency, supra* as modified on March 12, 1973 and July 26, 1973, 38 Fed. Reg. 17782 (July 3, 1973). Paragraph (3) of that order required the states whose implementation plans had been invalidated by that case to submit complying plans for the attainment of federal air quality standards by certain deadlines; upon their failure to do so, paragraph (5) (as modified) required the Administrator to propose a complying plan for the defaulting states by July 24, 1973 and promulgate one by October 15, 1973 "provided that any regulations requiring review of the construction,

modification, or enlargement of parking facilities shall be applicable to such facilities beginning August 15, 1972". The plan proposed contained a section requiring permits for parking facilities under certain circumstances, which section stated "after the date of this proposed regulation" a permit would be required, 38 Fed. Reg. at 17790. An announcement by the Administrator published at 38 Fed. Reg. 20851 (August 31, 1973) stated that parking facility regulations were to be effective as of August 15, 1973 apparently in compliance with the Court's order.

This issue of the August 15 effective date, specifically for parking facility regulations, was argued extensively at the hearing which resulted in the dismissal of the complaint in *Wuillamey*. The Court's opinion made no mention of it, but referred solely to the "proposal" status of the plan as a whole. On the basis of this and other grounds, a notice of appeal to the Third Circuit Court of Appeals has been filed in *Wuillamey*; also, plaintiffs in *Natural Resources Defense Council v. Environmental Protection Agency*, have moved for a clarification of the order as to the effective date of parking facility regulations proposed by the Administrator.

As to the reply made by the Administrator to the petitioners' demand that he move against the respondent Sports Authority to enforce the transportation control plan, obviously the petitioners do not agree with his opinion of the effective date of parking facility regulations. Further, the respondent seems to have made an erroneous representation of something else the Administrator said in that reply. He did *not* say that "Petitioners' remedy, as provided by Section 304 of the Clean Air Act, is a suit against one who is alleged 'to be in violation' of an emission standard under the Act" Resp. Br. 11. Rather, in response to a specific demand that he enforce the plan's parking facility requirements, the

Administrator stated that such enforcement was discretionary with him, and that "The appropriate use of Section 304 in such situations is to commence a civil action against *the alleged violation of the implementation plan.*" Resp. App. 2a, (emphasis added). Of course, this was the position of the Wuillamey plaintiffs in bringing suit.

II

The respondent states that New Jersey's Implementation Plan was not involved in the proceedings below, and that in any event, they were not a proper forum to contest the validity of the plan. The first assertion is simply untrue. As indicated in the *Statement of the Case, supra,* the New Jersey Supreme Court's affirmance of the agencies' findings was at least in part predicated on the belief that a valid plan was in effect; the fact that this was not the case indicates the infirmity of the decision below.

The respondent claims that the state tribunals were improper fora to raise issues concerning state implementation plans, and that the validity of such plans may only be contested in the United States Court of Appeals for the Third Circuit. First, the New Jersey Supreme Court could properly decide that the existence of a valid implementation plan was a requisite to approving state environmental hearings findings that federal air quality standards would not be violated and apparently did so. Thus, anyone challenging those hearings has standing to assert the invalidity of such a plan. Second, the fact that the validity of an approved implementation plan can only be challenged in a given court has nothing whatever to do with the issue of the propriety of a project's being commenced without review under a valid plan that *should* have been approved and in effect at that time and has not been.

Replies to Reasons for Denying the Petition

III

The third reason given for denial of the writ is that "The Complex Source Regulations Were Not Proposed Until After The Opinion Below, Have Not Yet Been Implemented, And Can Have No Bearing On These Proceedings." In short, this reason is based on the dates of proposal and promulgation and effective dates of the regulations which, if in effect, would require a preconstruction review of the sports complex. Generally, the petitioners do not disagree with the dates as stated by the respondent, except that to the extent that preconstruction review of complex sources is necessary for the attainment of federal air quality standards as opposed to the maintenance thereof. The deadlines for such regulations would, according to the D.C. Circuit Court's order, be proposed by July 26 and promulgation by October 15, 1973.

However, the real issue here is misstated by the respondent. The issue is the correctness of the decision by the New Jersey Supreme Court. The petitioners argued below that the Clean Air Act and regulations *then in effect* required preconstruction review of sources of air pollution such as the sports complex. The complex source regulations, proposed as promulgated thereafter, established that the petitioners' contention was correct.

40 C.F.R. Section 51.18, as amended by 36 Fed. Reg. 25233 (Dec. 30, 1971), required preconstruction review of stationary sources, e.g., factories, in state implementation plans. New Jersey's plan had been submitted and approval as providing for such review. Section 110 (a)(2)(B) of the Act, 42 U.S.C. Section 1857c-5(a)(2)(B), requires state plans to contain all measures "necessary to insure this attainment and maintenance" of federal standards. At 38 Fed. Reg. 9599 the Administrator said "In the

Administrator's judgment, this amplification of the requirements of 40 C.F.R. Section 51.18 is a step necessary to insure the maintenance of the national ambient air quality standards. . . " The Administrator was thus indicating that to be valid, all implementation plans should have been submitted with complex source review provisions from the beginning. If the requirements of the Act had been followed, New Jersey would have had provisions for such review by July 31, 1972, at the latest. The E.P.A. promulgated national ambient air quality standards on April 30, 1971, and Section 110 of the Act 42 U.S.C. Section 1857c-5 requires the states to submit their plans within nine months of such promulgation, i.e., by January 31, 1972. The Administrator is then required by Section 110(c), 42 U.S.C. 1857c-5(c) to approve or disapprove the plan within four months, and if a plan is disapproved, to promulgate one within six months of submission, or July 31, 1972.

This means two things: (1) The court below was incorrect in assuming the state's citizens were protected from violations of federal air quality standards by a valid implementation plan *even before* that plan was invalidated by the District of Columbia Court of Appeals; (2) Due to lack of compliance with the Act by the New Jersey Department of Environmental Protection and the United States Environmental Protection Agency, there has been a hiatus in regard to protective regulations between July 31, 1972 and the present, when the people of New Jersey had a right to such regulations. The Sports authority hopes to push its complex through the hiatus and gain vested rights before some kind of meaningful controls can be imposed on it. It should not be allowed to profit from the failures of these agencies to perform their duties, particularly when the Commissioner of one of them gave the approval for the complex to proceed, and the issue of the necessity of review of the complex pursuant to a valid plan was raised repeatedly as long ago as July of 1972.

CONCLUSION

By way of conclusion, petitioners would like to note that the matters raised in this Reply Brief has a result of respondent's brief are matters which, while arising in New Jersey, involve principles of national application. It seems clear that the Clean Air Act requires good faith and cooperation between each state and the Environmental Protection Agency if the beneficial objects of the Act are to be achieved. Without a clear statement from this Court requiring compliance by the States with the Act, it will unfortunately be inevitable that a state will sacrifice the quality of the air we all breathe if necessary to realize a state project. For the additional reasons set forth herein, therefore, it is respectfully requested that certiorari be granted.

Respectfully submitted,

s/ Frederick C. Mezey
Attorney for Petitioners